



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Telex Communications, Inc.

File: B-236981

Date: January 29, 1990

DIGEST

Since solicitation provision restricting the procurement to "previous proven producers" relates to bidder responsibility, not responsiveness of the bid, the General Accounting Office will not review an affirmative determination of bidder's responsibility in the absence of circumstances not applicable here.

DECISION

Telex Communications, Inc., protests the proposed award of a contract for antenna parts to R. A. Miller Industries, Inc., under invitation for bids (IFB) No. DAAB07-89-B-U794, issued by the U.S. Army Communications-Electronics Command, Fort Monmouth, New Jersey. Telex contends that Miller is not eligible for award because it is not a "previous proven producer," as required by the solicitation. We dismiss the protest.

The Army issued the IFB on July 27, 1989, to Telex and Miller only, justifying less than full and open competition on the basis of urgency. The justification and approval documents stated that the antenna parts were essential components of a number of types of radios and that the available supply of the parts was unacceptably low. A market survey conducted in June had identified only Telex and Miller as capable of both producing acceptable parts and delivering in accordance with the delivery schedule.^{1/} Clause A-8 of the IFB stated: "This procurement is otherwise restricted to previous proven producers." The

^{1/} The survey identified two other potential sources, but one of these firms had not passed first article testing and the other was 12 months behind schedule under its existing contract.

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solicitation did not define "previous proven producers" or otherwise contain standards for applying the eligibility criterion.

Miller's bid was \$2,080,672, while that of Telex was \$2,645,242. Telex contends that Miller's bid should not be accepted because the firm cannot be considered a previous proven producer for several reasons. First, Telex notes that Miller has an existing contract with the Army to produce the required antennas, a contract that requires Miller to pass first article testing. Telex points out that first article testing generally is not required if the agency believes that a firm is a proven producer. Second, Telex contends that Miller had not received first article approval as of the bid opening on August 29. Third, Telex notes that of the 20 items subjected to first article testing, 5 failed. Finally, Telex points out that, as of bid opening, Miller had not produced the items in required production quantities. For all of these reasons, Telex believes that the Army must reject Miller's bid as nonresponsive.

The Army contends that whether Miller is a previous proven producer is a matter of responsibility, not responsiveness. Further, the Army reports that while it has not yet made a final responsibility determination, it has concluded that Miller qualifies as a previous proven producer.

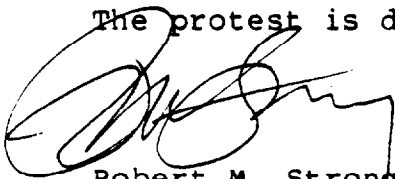
The Army concedes that when it conducted its market survey in June 1989, Miller had not yet passed first article testing under its existing contract. Nevertheless, the agency determined that Miller was making satisfactory progress. In that regard, the Army reports that although some of Miller's parts initially failed first article testing, Miller repaired those items and they subsequently passed.^{2/} The cause of the failures has been identified and corrected. Miller received first article approval on August 16, and made partial deliveries in October. As of November, Miller was slightly ahead of the required delivery schedule, and the pre-award survey results indicate that Miller has the ability to meet the delivery requirements of

^{2/} Miller's existing contract incorporates the clause at Federal Acquisition Regulation section 52.209-3, which provides for repair and retesting of items that initially fail first article testing.

the proposed contract. The Army reports that at least since 1973, Miller has been producing the required items.^{3/}

We agree with the Army that whether Miller qualifies as a previous proven producer is a matter of responsibility. The requirement does not involve any obligation on the part of the bidder concerning the items to be delivered, but rather relates solely to a firm's ability to comply with the terms of the solicitation. Because such a determination is largely judgmental, this Office does not review affirmative responsibility determinations in the absence of a showing of either agency bad faith or misapplication of definitive responsibility criteria. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1989). There has been no showing of bad faith here and, in our view, the undefined requirement that the awardee be a previous proven producer is not the type of specific objective requirement that could be viewed as a definitive responsibility criterion. Compare DJ Enters., Inc., B-233410, Jan. 23, 1989, 89-1 CPD ¶ 59 (requirements that the contractor have maintained a service organization for at least 5 years and submit a list of five customer service locations). Rather, it appears the Army included clause A-8 in the solicitation merely to indicate that this procurement was restricted and that, because time would not allow for a first article testing period, the only firms considered for award would be those whose prior production of the items demonstrated a capacity to deliver the items required on time.

The protest is dismissed.



Robert M. Strong
Associate General Counsel

^{3/} The record does not indicate why, in light of the firm's prior history of producing the item, Miller's current contract contains a first article testing requirement.